

PHILLIP N. HAYES)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 10/27/2005
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport
News, Virginia, for self-insured employer.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Allen H.
Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2000-LHC-2937) of
Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the
provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33
U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of
fact and conclusions of law if they are supported by substantial evidence, are rational, and

are in accordance with law. 33 U.S.C. §921(b) (3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On October 15, 1991, claimant sustained a neck injury in the course of his employment with employer. Prior to this injury, claimant had pre-existing neck, shoulder and back conditions, for which he had undergone two surgical procedures and permanent work restrictions had been assigned. Employer voluntarily paid claimant various periods of temporary total and temporary partial disability benefits, and filed a request for Section 8(f) relief, 33 U.S.C. §908(f).

Following the referral of the case to the Office of Administrative Law Judges, employer and claimant advised the administrative law judge that they had reached an agreement as to claimant’s entitlement to permanent partial disability benefits and that they were preparing stipulations for approval. Employer submitted evidentiary exhibits in support of its request for Section 8(f) relief and requested that a briefing schedule be set on the issue of employer’s entitlement to Section 8(f) relief. In response to the administrative law judge’s February 11, 2003 Order setting a briefing schedule, employer and the Director, OWCP (the Director), submitted briefs on the Section 8(f) issue. Employer additionally filed a motion requesting that it be permitted to submit additional evidence in support of its request for Section 8(f) relief in light of the recent decisions of the United States Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003) and *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003) regarding the evidence necessary to establish an employer’s entitlement to Section 8(f) relief.

In a Decision and Order issued on August 7, 2003, the administrative law judge referenced the parties’ representation that they had reached agreement as to claimant’s entitlement to permanent partial disability benefits, but did not make an award of benefits pursuant to the parties’ agreement. The administrative law judge next denied employer’s motion to re-open the record for the submission of additional evidence in support of employer’s Section 8(f) request. Proceeding to address the issue of employer’s entitlement to Section 8(f) relief, the administrative law judge found that the Director conceded that claimant had a manifest, pre-existing permanent partial disability. The administrative law judge further found, however, that employer failed to establish the contribution element and he therefore denied employer’s claim for Section 8(f) relief.

Employer appealed to the Board, challenging both the administrative law judge’s denial of Section 8(f) relief and the administrative law judge’s denial of its motion to submit additional evidence based on recent case law. BRB No. 03-0791. The Director filed a motion to vacate the administrative law judge’s Decision and Order denying Section 8(f) relief and to remand the case to the administrative law judge for the entry of

an order awarding benefits to claimant.¹ The Board granted the Director's motion in an Order issued on June 21, 2004, and, accordingly, vacated the administrative law judge's Decision and Order denying Section 8(f) relief and remanded the case to the administrative law judge for the entry of a compensation award based on the parties' stipulations and/or findings of fact following a hearing. See 33 U.S.C. §919(d); 20 C.F.R. §§702.331-702.351.

On remand, the parties submitted stipulations to the administrative law judge which had been signed by counsel for claimant, employer and the Director. In a Decision and Order on Remand issued on October 27, 2004 (D&O on Remand), the administrative law judge awarded claimant benefits pursuant to the parties' stipulations² and, incorporating by reference his previous Decision and Order dated August 7, 2003 (D&O), denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief; specifically, employer contends that the administrative law judge erred in finding that employer failed to establish the contribution element. Employer additionally assigns error to the administrative law judge's refusal to reopen the record for employer to submit additional evidence. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief on the basis that the contribution element was not satisfied and of the administrative law judge's denial of employer's motion to supplement the record.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S. C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, as here, if it establishes: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33

¹ In support of his motion, the Director cited the Board's decision in *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999), in which the Board held that without an underlying compensation order awarding 104 weeks of permanent disability and/or death benefits to claimant, the administrative law judge is precluded from addressing the applicability of Section 8(f).

² Specifically, the administrative law judge awarded temporary total disability benefits from February 5, 1993 to April 4, 1993 and from April 18, 1994 to September 11, 1994; temporary partial disability benefits from February 14, 1998 to February 2, 2000; temporary partial disability benefits from February 28, 2000 to March 17, 2000; and continuing permanent partial disability benefits from March 18, 2000.

U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995).

In order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, employer must quantify the level of the impairment that would ensue from the work-related injury alone. *Harcum I*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the court further explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Cherry*, 326 F.3d 449, 37 BRBS 7(CRT); *Ward*, 326 F.3d 434, 37 BRBS 17(CRT).

Prior to the 1991 neck injury that is the subject of this claim, claimant was working for employer under permanent work restrictions due to his pre-existing neck, shoulder and back conditions. Dr. Tornberg, employer's medical director, reviewed claimant's medical records dating to 1962 and, in a three-page letter, discussed the contents of those records. EX 1 at 4-6. Dr. Tornberg detailed claimant's treatment for shoulder, back and neck pain, his multiple work-related back and neck injuries, his surgical procedures,³ and his work restrictions.⁴ Dr. Tornberg stated that claimant's pre-

³ Prior to his 1991 work injury, claimant had undergone a partial hemilaminectomy for a herniated lumbar disc on September 28, 1983, and had undergone a discectomy for a ruptured cervical disc in August 1988, EX 1 at 5, 22-24. Following his 1991 work-related injury, claimant underwent a cervical hemilaminectomy on June 17, 1994. EX 1 at 6, 46.

⁴ On June 28, 1988, Dr. Rinaldi issued permanent work restrictions based on his surgical treatment of claimant's herniated lumbar disc including avoiding bending, stooping, climbing and lifting more than 35 pounds. EX 1 at 5, 23, 26. Following claimant's cervical discectomy, Dr. Rinaldi released claimant to return to work on September 12, 1988, indicating he was to wear a light hard hat and avoid prolonged hyperextension of his head and neck. EX 1 at 5, 23-25, 27. On October 14, 1988, Dr. Rinaldi stated that the restriction on hyperextension of claimant's head and neck was permanent. EX 1 at 28.

existing chronic back, neck and shoulder disabilities were serious and permanent and that a cautious employer would not hire a person for heavy manual labor if he had the history of back problems that claimant had by the early 1970's. Dr. Tornberg stated that claimant's 1991 work-related neck injury permanently aggravated and worsened his previously weakened and defective back structure resulting in his current disability. He concluded that claimant's disability

is not caused by his October 15, 1991 neck injury alone, but rather his disability is materially contributed to, and made materially and substantially worse by his pre-existing chronic back, neck, and shoulder disability. Mr. Hayes' October 15, 1991 injury was rather minor, if it [sic] he had a normal back, neck, and shoulder it would have resolved with no permanent disability.

Ex 1 at 6. In a letter dated May 8, 2001, claimant's treating neurosurgeon Dr. Peach, based on a review of his own records as well as the report of Dr. Tornberg, stated that claimant had numerous neurological problems, some requiring surgery and work restrictions, prior to his October 15, 1991 work-related injury. Observing that the 1991 work injury was a valid injury requiring treatment and work restrictions, Dr. Peach opined that claimant's current disability is not due solely to his 1991 injury, but rather is due to a combination of factors including his previous injuries, surgeries and work restrictions and his subsequent surgeries and additional restrictions.⁵ EX 2.

The administrative law judge found that neither the opinion of Dr. Tornberg nor that of Dr. Peach was sufficient to establish the contribution element necessary to employer's entitlement to Section 8(f) relief. The administrative law judge described Dr. Tornberg's report as "merely a summary of claimant's medical history produced upon review of his medical records," and characterized Dr. Tornberg's conclusions as "stock, boilerplate language which includes the proper 'buzz words' usually associated with the contribution element." Decision and Order at 4. Next, the administrative law judge found that Dr. Tornberg's report does not quantify the level of disability that would ensue from the 1991 work-related injury alone. Moreover, the administrative law judge, observing that Dr. Tornberg provided no medical support for his conclusions, found that the report was "conclusory and unsupported." *Id.* After considering Dr. Peach's letter dated May 8, 2001, the administrative law judge found Dr. Peach's opinion insufficient to establish contribution on the basis that it failed to quantify the level of disability that

⁵ In a letter dated August 14, 2001, Dr. Tornberg concurred with the opinion expressed in Dr. Peach's May 8, 2001 letter, noting that Dr. Peach's findings are consistent with Dr. Tornberg's previous letter of May 10, 2000. Dr. Tornberg added that he had personally evaluated claimant for management of his chronic low back pain following an injury on April 14, 2000. EX 4.

would have resulted from claimant's 1991 work injury alone. Decision and Order at 4-5. The administrative law judge concluded that as employer failed to properly quantify the level of disability resulting from the 1991 injury alone, the contribution element was not established and employer is not entitled to Section 8(f) relief. Decision and Order at 5.

Employer contends on appeal that the administrative law judge erred in finding that employer's evidence is insufficient to quantify the level of disability arising from the 1991 injury alone. In this regard, employer avers that the opinion of Dr. Tornberg, as corroborated by the opinion of Dr. Peach, provides the quantification required to satisfy the contribution element. Employer additionally asserts that the rationale for these physicians' opinions is readily apparent from their reports. Emp. P/R at 2-4. In his response brief, the Director concedes the probability that the administrative law judge erroneously found Dr. Tornberg's report to be legally insufficient to quantify the level of disability ensuing from the 1991 work-related injury alone. Dir. Resp. Br. at 11. Nonetheless, the Director contends that the administrative law judge properly rejected Dr. Tornberg's opinion on the basis of its conclusory nature.

For the reasons that follow, we conclude we must vacate the administrative law judge's denial of Section 8(f) relief and remand the case for further consideration by the administrative law judge. Dr. Tornberg, in his three-page letter dated May 10, 2000, fully set forth and documented claimant's voluminous medical history. EX 1 at 4-6. Under these circumstances, we cannot agree with the administrative law judge's characterization of Dr. Tornberg's letter as "merely a summary of claimant's medical history produced upon review of his medical records" and that his conclusions are "conclusory and unsupported." Decision and Order at 4. Dr. Tornberg's multiple-page letter, which enumerates in detail claimant's prior surgeries and the work restrictions imposed prior to claimant's 1991 neck injury, is indicative that he took claimant's prior medical conditions into account in reaching his conclusion that absent those pre-existing conditions, claimant's 1991 injury would have resolved with no permanent disability. EX 1 at 6. Thus, Dr. Tornberg's letter report, considered in its entirety, may provide a basis for discerning the logic underpinning the doctor's conclusion. See *Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 662, 34 BRBS 55, 59(CRT) (3^d Cir. 2000); *Ceres Marine Terminal v. Director OWCP*, 118 F.3d 387, 391, 31 BRBS 91, 94(CRT) (5th Cir. 1997); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___, BRB No. 04-0742 (June 21, 2005), slip op. at 10-11.

Moreover, although the administrative law judge found that Dr. Tornberg's report does not quantify the disability attributable to claimant's 1991 work injury alone, Dr. Tornberg, having characterized claimant's 1991 injury as "rather minor," stated that had claimant "had a normal back, neck and shoulder," his work injury "would have resolved with no permanent disability." EX 1 at 6. In his response brief, the Director concedes that, in light of the Fourth Circuit's decision in *Cherry*, 326 F.3d at 454, 37 BRBS at

10(CRT), it is probable that Dr. Tornberg's opinion "is legally sufficient to meet the employer's quantification burden." Dir. Resp. Br. at 11.

Accordingly, on remand, the administrative law judge must determine whether there is a reasoned and documented basis for Dr. Tornberg's opinion, and he must evaluate the opinion in light of the totality of the relevant evidence of record. *See Carmines*, 138 F.3d at 140-141, 32 BRBS at 52(CRT); *Wheeler*, slip op. at 10-11; *see also Pennsylvania Tidewater*, 202 F.3d at 663, 34 BRBS at 60(CRT); *Ceres Marine Terminal*, 118 F.3d at 391, 31 BRBS at 94(CRT). In reconsidering the evidence on remand, the administrative law judge should be mindful that employer is not required to establish the contribution element by virtue of a single medical opinion. *See Ward*, 326 F.3d at 443, 37 BRBS at 23(CRT). In this regard, although the administrative law judge found that Dr. Peach's report does not quantify the level of disability attributable to claimant's 1991 injury alone, Decision and Order at 4-5, he should consider, on remand, whether this report, when considered in conjunction with Dr. Tornberg's opinion and the other relevant evidence of record, would support a finding of contribution. *See Ward*, 326 F.3d at 443, 37 BRBS at 23(CRT); *Carmines*, 138 F.3d at 140-141, 32 BRBS at 52(CRT); *Wheeler*, slip op. at 10-11; *see also Pennsylvania Tidewater*, 202 F.3d 656 34 BRBS 55(CRT); *Ceres Marine Terminal*, 118 F.3d 387, 31 BRBS 91(CRT). We therefore vacate the administrative law judge's finding that employer failed to establish the contribution element required for Section 8(f) relief, and we remand the case for the administrative law judge to consider and discuss all of the evidence relevant to this issue, and to make appropriate findings based on the relevant law and evidence.

Lastly, in light of our decision to remand the case for further consideration, we need not reach the issue of whether the administrative law judge's refusal to reopen the record for the development of new evidence constitutes reversible error.⁶ On remand, should employer consider it necessary to submit additional evidence, it may renew its motion to reopen the record for that purpose, and the administrative law judge must consider such request in accordance with the applicable legal standards. *See, e.g., Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); 20 C.F.R. §702.338.

Accordingly, the administrative law judge's Decision and Order on Remand denying Section 8(f) relief is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

⁶ It is well established that an administrative law judge has great discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *See, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 29 (1999).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge